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IN THE

Supreme Court of the United States

October Term, 1965

NO. 638

STANDARD-TRIUMPH MOTOR COMPANY, INC.,
Petitioner

v.

CITY OF HOUSTON and HOUSTON INDEPENDENT SCHOOL DISTRICT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices Of the Supreme Court Of The United States:

Petitioner, STANDARD-TRIUMPH MOTOR COMPANY, INC. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 25, 1965 on which a petition for rehearing was overruled on July 6, 1965. Mandate of the Court was entered July 20, 1965.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Texas (R. 49) is reported at 220 F. Supp. 732. The opinion of the Court of Appeals for the Fifth Circuit (R. 64) (Appendix pp. 14-35) is reported at 347 F.2d 732.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was made and entered on May 25, 1965. Petition for rehearing was overruled by that Court on July 6, 1965. A copy of that ruling is appended to this petition in the Appendix at page 39. (R. 117) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner by a prayer for declaratory judgment, questioned the authority of the Respondents to assess and collect an ad valorem tax on imported automobiles. The Respondents counter-claimed for a stipulated amount of such taxes. The Trial Court entered judgment for Petitioner and denied Respondents' action (R. 54).

On appeal, Respondents raised for the first time the question of jurisdiction and the effect thereon of the Johnson Act, 28 USCA, Sec. 1341 (Appendix p. 13). The Court of Appeals by Judge Brown, Judge Rives dissenting, reversed, vacated and remanded the judgment. The questions presented are:

1. Was the counter-claim of the Respondents City and School District for recovery of taxes assessed and levied the assertion of a compulsory counter-claim under Rule 13(a) sufficient to give the Trial Court jurisdiction to

determine the controversy on its merits when there were independent grounds of jurisdiction, by diversity and jurisdictional amount?

2. Does the District Court have discretionary jurisdiction to determine the validity of an ad valorem tax assessed by the Respondents City and School District on imports as a violation of Article I, Section 10 of the Constitution of the United States?

3. Is an ad valorem personal property tax levied by the Respondents City and School District on imported automobiles held by the importer pending sale, under the rule stated in *Brown v. The State of Maryland* (1827) 12 Wheat. 441, 25 U.S. 678, 6 L.Ed. 678, a violation of Article I, Section 10 of the Constitution of the United States?

The pertinent portions of Rule 13(a) Fed. R.C.P. are set forth in the Appendix at page 13. The Johnson Act, 28 USCA, Sec. 1341, is set forth in the Appendix at page 13 and the pertinent portions of Article I, Section 10 of the Constitution of the United States is set forth in the Appendix at page 13.

STATEMENT

An action for declaratory judgment was filed by Petitioner, the importer of British Triumph automobiles through the Port of Houston. The vehicles in possession on tax assessment day, January 1st of the years 1961, 1962 and 1963 were still the property, and in the physical custody of Petitioner. Except for filling of batteries and putting in a small amount of gasoline to facilitate transfer from dockside to Petitioner's storage area in the City, each of the automobiles was in substantially the same condition as

when shipped from England and discharged from the vessel. An automobile seldom remained more than ninety days in pre-sale storage. When as Petitioner sold a car to one of its distributor-dealers, it was withdrawn from storage, any marine transportation damage repaired, the automobile cleaned of protective coatings, and certain equipment such as bumpers, hub caps, windscreens, and the like installed in place. The suit was brought about by the different interpretations of whether these vehicles were still imports on January 1st of each year or had ceased to be imports, each party applying the rule of *Brown v. The State of Maryland*, 1827, 12 Wheat 441, 25 U.S. 678, 6 L.Ed. 678.

The City and School District filed an answer to the complaint of the Petitioner admitting certain allegations and denying others and prayed that the automobiles be held to be taxable property within the State of Texas and within the jurisdiction of the Respondents.

By way of counter-claim (R. 43) the Respondents alleged that the vehicles were taxable property within the meaning of the statutes and laws of Texas, as they had ceased to be imports. Further they alleged that such automobiles were assessed for taxation for the year 1961 and that a tax of $17,781.03 had been levied against such vehicles. The Respondents prayed that they have judgment for their taxes in that sum together with such penalties, interest and attorney's fees as may have accrued.

The District Judge agreed with the contentions of the importer (Petitioner) and entered a declaratory judgment decreeing that the assessment of these vehicles for the years indicated was and is an invalid assessment on imports and as such was and is an unconstitutional tax on imports (R. 54).

It was stipulated by the parties (R. 47) that the vehicles had a value of $488,490.00 on January 1, 1961 upon which was assessed a tax of $17,781.03 plus 10% penalty and 6% interest from January 1, 1962. It was further stipulated that the decision of the Court on the tax year 1961 would be binding on the parties for subsequent tax years (R. 48).

The District Court entered judgment on the pleadings, the stipulations and the evidence presented (R. 54) finding the vehicles to be imports on January 1, 1961 and finding that the tax was an unconstitutional tax on imports in violation of Article I, Section 10 of the Constitution of the United States. The Court further ordered that the counter-claim of the Respondents be dismissed with prejudice (R. 54).

On appeal, Respondents for the first time questioned the jurisdiction of the District Court to entertain a declaratory judgment suit as that jurisdiction is affected by the Johnson Act, 28 USCA Sec. 1341 (Appendix p. 13).

On this appeal the Circuit Court, by a divided Court, Judge Rives dissenting, without deciding the merits, held that the District Court was precluded from entertaining this action, holding that the Johnson Act even though speaking in terms of injunction, also precluded the District Court from having jurisdiction under declaratory judgment attacking the assessment, levy or collection of any tax under state law.

The Circuit Court also held the counter-claim was merely incidental to a claim for declaratory relief which ought not to have been entertained by the Trial Court under Rule 13(a) and that a proper reframing of the judg-

ment under Rule 54(c) (Appendix p. 39) would not compel an affirmance.

In reaching this decision, the majority of the Court held that the Johnson Act is a restraint on the Court and not the parties so that the "so-called counter-claim was merely incidental to a claim for declaratory relief which ought not to have been entertained and relief thus sought by the City would have flowed automatically from the proper framing of the judgment. The affirmance of the take nothing judgment is not compelled by the cases". (R. 117)

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by the Court for the following reasons:

(1) The decision of the Court below has decided an important question of federal law which has not been but should be, settled by this Court. This question is an apparent conflict between the application of Fed. R.C.P. 13 (a) (Appendix p. 13), and of 28 U.S.C.A. Sec. 1341 (Appendix p. 13), wherein the requirement of Rule 13(a) that all actions arising out of the same transaction be pleaded or be waived, meets head-on the holding of the Court below that Sec. 1341 precludes the final determination on the merits of a claim and compulsory counter-claim each fully developed before the Court, even when there is an independent ground of federal jurisdiction over the counter-claim by diversity between the City, the School District and Petitioner.

It is submitted that the counter-claim filed by Respondents (R. 45) under Rule 13(a) was a compulsory one as "it arises out of the transaction or occurrence that is the subject matter of the opposing parties' claim . . .". *Moore*

v. New York Cotton Exchange (1926) 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750; Moore's Federal Practice, Volume 3, Page 30 et seq., Section 13.13; and *Great Lakes Rubber Corporation v. Herbert Cooper Company*, 286 Fed. 2d 631 (3d Cir. 1961).

Under these cases the Trial Court had jurisdiction of the counter-claim by diversity with a Texas counter-claimant and a New York corporation as counter-defendant. The policy of Rule 13(a) as delineated in this Court and in the Third and Ninth Circuits, requires the Trial Court to retain jurisdiction of the counter-claim so as to determine the case on the merits. This it did.

Against this lies the contrary policy asserted by the Court below in its application of Sec. 1341, when it held that the Trial Court acquired no jurisdiction to determine the merits of the case on the counter-claim. That Court held that the Johnson Act is a restraint, not upon the parties, but upon the Court, thereby asserting, contrary to other cases, a predominance of that Act over Rule 13(a).

This conflict gives rise to the necessity for the settlement by this Court of the disputed question.

(2) The decision of the Court below is in conflict with a prior ruling of this Court as it is contrary to the rule established in an analogous case involving old Equity Rule 30 in *Moore v. New York Cotton Exchange* (1926) 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750.

Moore brought suit under the Sherman Act against the cotton exchange for its refusal to furnish ticker service to Moore. Defendant answered and set up a counter-claim

complaining that Moore was obtaining the information from the ticker without permission, and asked that he be enjoined from continuing such practice. Western Union, the purveyor of the stock quotations was made a party Defendant. Federal jurisdiction was invoked under the Sherman Act as stating a federal question.

This Court in applying Equity Rule 30 found that the Trial Court had jurisdiction of the action but the claim was without merit and was properly dismissed by the Trial Court. However, it also held that it was proper for the Trial Court to consider the counter-claim as a compulsory one and grant injunction.

The case at bar presents an opportunity for this Court to make it clear that the same policy established under old Equity Rule 30 of avoiding useless multiplicity of litigation is found in Rule 13(a).

(3) The decision of the Court below is in conflict with the decisions of other Courts of Appeal on the same rule, to-wit:

In the Third Circuit in *Great Lakes Rubber Corporation v. Herbert Cooper Company,* 286 Fed.2d 631 (3d Cir. 1961) which held that a counter-claim by *Great Lakes,* which had been dismissed earlier as a complaint for lack of diversity, was erroneously dismissed by the Trial Court as it was a compulsory counter-claim to the action of *Cooper* which began as a counter-claim and which was retained as permissive containing federal question jurisdiction; and *Sachs v. Sachs,* 265 Fed.2d 31 (3d Cir. 1959) which held that a *permissive* counter-claim for arrears under a Massachusetts support order would be held and decided even though the original complaint for divorce

was dismissed for want of jurisdiction, when the counter-claim has independent grounds of jurisdiction.

In the Ninth Circuit *Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Company,* 206 Fed. 2d 336 (Ninth Cir. 1953); Cert. Den. 346 U.S. 899 (1953), the original complaint was dismissed for a "non-jurisdictional reason" because of absence of indispensable parties. The Trial Court dismissed the counter-claim at the same time. However, the Circuit Court held that it had been erroneously dismissed as there was an independent ground of jurisdiction which was sufficient to sustain the counter-claim.

However, the rule as stated by the Ninth Circuit is that if a complaint is dismissed for some reason other than "want of jurisdiction", a compulsory counter-claim should be retained and decided. The Court in *Pioche* expressly disagrees with the rule of the Third Circuit stated in *Great Lakes Rubber Corporation* as it suggests that if the complaint is dismissed for "want of jurisdiction", the compulsory counter-claim should not be retained. This establishes an additional conflict in the policy of Rule 13(a) between the Third, the Ninth and the Fifth Circuits.

If the dismissal in the case at bar of Petitioner's declaratory judgment proceeding was non-jurisdictional, the holding of the Fifth Circuit would be in conflict with the Ninth Circuit and *Pioche Mines* case; or if the dismissal was jurisdictional it would be in conflict with the rule in the Third Circuit and the *Great Lakes Rubber* case.

(4) The decision of the Court below is contrary to the pre-existing rule of the Fifth Circuit found in *Haberman v. Equitable Life Assur. Soc. of U. S.,* 24 Fed.2d 401

(Fifth Cir. 1955); Cert. Den. 350 U.S. 948 (1956), where the insurance company brought a declaratory judgment action to determine the present value of an annuity and the executor in a counter-claim brought an action for a sum certain under the policy.

A question of jurisdiction of the Court below was raised which the Fifth Circuit held to be immaterial as the Court had jurisdiction over the counter-claim as a compulsory one under Rule 13(a). The Court affirmed the action of the Trial Court granting judgment on the counter-claim.

(5) The Court below has decided an additional important question of Federal Law which has not been but should be, settled by this Court on the applicability of the Johnson Act, 28 USCA, Section 1341 (Appendix, Page 13, as that act affects the authority of the District Court to determine the validity of a state tax by a declaratory judgment action.

(6) The Trial Court and the Court below had before them the fully developed question of constitutional law in the application of Article I, Section 10 of the Constitution of the United States (Appendix Page 13) to a tax on imports and it was the duty of the Trial Court and Court below to grant the relief and to determine this constitutional question.

This Court in recent years has had before it two cases, *Hoover & Allison Co. v. Evatt,* 324 U.S. 652, 89 L.Ed. 1252 (1945) and *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534, 3 L.Ed.2d 490 (1959) applying the doctrine of *Brown* to a more modern economy. However, the

original package doctrine of *Brown* has not been applied to imports of the nature of these vehicles.

It is submitted that the opinion of the Trial Court (R. 51-53) is a concise application of previous decisions to the facts presented. The market for foreign manufactured cars is large and has grown to the magnitude of the present volume of imports within the last ten years. This briefer has been able to find no cases arising in any federal court determining the taxability by a state of this type of import.

This case presents an opportunity to this Court to write on this point of great interest to a large industry.

The questions presented by this case are of great and recurring significance in the application of the rules of civil procedure with apparent conflicting congressional enactments. The serious questions of public policy involved here arising from this conflict and the effect of the decision below by a divided Court, makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

It is respectfully submitted that this Court should exercise its inherent power of supervision over the administration of the Federal District and Circuit Courts and decide the conflict found in the cases interpreting Rule 13(a) and the conflict in applying the rule of the Johnson Act as that rule has been stated by the Fifth Circuit Court.

CONCLUSION

For the reason set forth above, it is respectfully submitted that this petition for a writ of certiorari should

be granted, and the decision of the Circuit Court reversed and remanded to that Court for consideration of the merits of the case.

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CERTIFICATE OF DELIVERY

STATE OF TEXAS)
)
COUNTY OF HARRIS)

I, Joyce Cox, Attorney of Record for Petitioner, Standard-Triumph Motor Company, Inc., and a member of the Bar of the Supreme Court of the United States, depose and say that on the 29th day of September, 1965, triplicate copies of the foregoing Petition for Writ of Certiorari in the Supreme Court of the United States were served in person on Honorable Homer T. Bouldin, First Assistant City Attorney, City of Houston, City Hall, Houston, Texas, Attorney of Record for the Respondent.

SUBSCRIBED AND SWORN TO before the undersigned authority this the 29th day of September, 1965.

Notary Public in and for
Harris County, Texas.

APPENDIX

U.S.C.A. Const., Art. I, Section 10

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

Title 28 U.S.C.A. Sec. 1341

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

Fed. R. Civ. P. Rule 13(a) 28 U.S.C.A.

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not to be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, effective March 19, 1948.

OPINION OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Caption Omitted)

(May 25,1965)

Before RIVES and BROWN, Circuit Judges, and NOEL District Judge.

BROWN, Circuit Judge: The substantive problem presented by this case is whether imported English automobiles are immune from Texas ad valorem taxation under the Import-Export Clause[1] of the Constitution. But that question is now secondary for the appeal turns on whether the District Court should have entertained the declaratory judgment suit at all. On that score we hold in the negative, vacate the judgment and remand the case.

The facts may be here severely capsulated since these, together with the legal issues involved are set forth with clarity in the able opinion of the District Judge. *Standard-Triumph Motor Co. v. City of Houston and Houston Ind. School Dist.*, S.D.Tex., 1963, 220 F.Supp. 732. The suit was filed by the Importer,[2] the importer of British Tri-

[1] Art. 1 §10, Clause 2 of the Constitution:
"No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws* * *."

[2] Standard-Triumph Motor Company, Inc.

umph automobiles, many of which are in the popular sports class. The automobiles involved were on T-day[3] still the property, and in the physical custody, of Importer. Except for filling of batteries and putting in a small amount of gasoline to facilitate transfer from dock side to Importer's storage area in the city, each of the automobiles was in substantially the same condition as when shipped from England and discharged from the vessel. An automobile seldom remained more than 90 days in pre-sale storage. When and as Importer sold a car to one of its distributor-dealers, it was withdrawn from storage, any marine transportation damage repaired, the automobile cleaned of protective coatings, and certain equipment such as bumpers, hubcaps, windscreens, and the like installed in place. This procedure took ordinarily not more than three to four hours. It being conceded by stipulation that the automobiles were imported and the Importer was the importer, the controversy raged about whether they were still imports or whether by reason of these activities of Importer, they had ceased to be imports. Quite understandably, the antagonists took as gospel and scripture, good for attack and defense, the celebrated opinion by Chief Justice Marshall in *Brown v. The State of Maryland*, 1827, 12 Wheat 441, 25 U.S. 678, 6 L.Ed. 678. The taxing authorities, faced with the inescapable fact that the automobiles were imported, not for *use* by the importer, but for resale by it, stressed heavily the concept articulated in *Hooven & Allison Co. v. Evatt*, 1945, 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252, and applied in *Youngstown Sheet & Tube Co. v. Bowers*, 1958, 358 U.S. 534, 79 S.Ct. 383, 3 L.Ed.2d. 490, to sustain state taxation, that the importer "had so acted upon

[3] Tax day January 1 of 1961, 1962, 1963.

the imported materials as to cause them to lose their distinctive character as imports by irrevocably committing them, after their importation journeys have definitely ended,"[4] to the use for which they had been imported.

On the facts and stipulations, the District Judge concluded that the automobiles were still imports. In response to the express prayer of the complaint, the Court entered a declaratory judgment decreeing that the "assessment of" the specified automobiles for each of the three years 1961-1962-1963 "was and is an invalid assessment on imports" and "was and is an unconstiutional tax on imports" and therefore "was and is illegal and null and void."[5]

By this appeal, the taxing authorities make a dual attack which, apart from the intrinsic merits, brings seriously into question for the first time in this litigation the propriety of the Federal Court entertaining the declaratory judgment suit at all. Because we think this first—albeit completely new—ground is decisive, we do not reach the second question concerning the merits.

For the challenge of the propriety of a Federal declaratory suit, the taxing authorities stand squarely on the Johnson Act which, as it now appears in the Judicial Code as revised in 1948, reads as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State Law where a plain, speedy

[4] 358 U.S. 543.

[5] The final decree dismissed with prejudice the taxing authorities counterclaim for taxes as assessed.

and efficient remedy may be had in the courts of such State."[6]

To this the Importer makes a triple response. First, the contention comes too late and was effectually waived below. Second, the Johnson Act, whether in prohibitory or jurisdictional terminology, proscribes injunctive, restraining orders only, not declaratory judgments. And third, Texas court remedies are not "plain, speedy and efficient."

As to the first, we think in fact that the taxing authorities acquiesced without objection to the Federal declaratory judgment proceeding. There might, just barely possibly might, be a paper denial.[7] But certainly the taxing

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[6] 28 USCA §1341. As originally enacted, Act of August 21, 1937, c. 726, 50 Stat. 738, amending §24 of the Judicial Code, 28 USCA §41(1), it provided that "No district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state."

The Reviser offered these explanations of the 1948 changes:

"This section restates the last sentence of said section 41(1).* * * Words 'at law or in equity' before 'in the courts of such state' were omitted as unnecessary.

"Words 'civil action' were substituted for 'suit' in view of rule 2 of the Federal Rules of Civil Procedure.

"Words 'under State law' were substituted for 'imposed by or pursuant to the laws of any State' for the same reason." 28 USCA §1341, quoting from, H.Rep. No. 308, 80th Cong.

[7] Art. III of the complaint, headed up "Statement of Case," had subparagraphs (1) through (10). Subpar. (10) categorically alleged that the Importer did not have "an adequate and speedy remedy in the Courts of Texas" for the reason that (a) in the threatened tax suits against the Importer, penalties and interest would continue to accrue, (b) under Art. 7329 [note 12, infra], defenses which may be pleaded do not comprehend the Importer's constitutional claim and (c) there is no local law question. To this in

authorities registered no real opposition. The detailed pre-trial order, F.R.Civ.P. 16, made no mention of it as even a remote possible issue and it is not surprising, therefore, that the Judge's opinion is completely silent on the point. The upshot of it is that were the Johnson Act not a restraint upon the Court itself but a mere matter left to the parties, we would readily conclude that there had been a waiver.

A consideration of the second argument—inapplicability of the Johnson Act to declaratory suits—demonstrates two things. First, the policies proscribing injunctive suits forbid declaratory actions as well. And second, this congressional adjustment of comity considerations is not a matter left to private parties to waive or assert as their interests might dictate.

The Supreme Court in *Great Lakes Dredge & Dock Co. v. Huffman*, 1943, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407, made the answer crystal clear. What was done parallels in importance what was said. Our Court had affirmed, on the merits, a declaratory judgment of the Federal District Court for the Eastern District of Louisiana declaring that a Louisiana unemployment tax was constitutionally applicable to crew members of dredges notwithstanding the uniformity of admiralty concept. Although, on the same day, the Supreme Court sustained the validity of that type of

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Art. II of the answer, the taxing authorities made this ambiguous response:

> "Defendants are without information or knowledge sufficient to form the basis of a belief as to the truth of the allegations contained in subparagraphs (4), (5), (6), (8), (9) and (10), insofar as such subparagraphs allege matters peculiarly within the knowledge of plaintiff or insofar as such subparagraphs allege legal conclusions; the remainder of the complaint is denied."

unemployment tax statute,[8] the Supreme Court affirmed our judgment "but solely on the ground that in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits." 319 U.S. at 301. The Court, therefore, just as we are doing here, extinguished altogether the adjudication of the merits even though the judicial travail had been incurred and the offspring was robust and legitimate, that is right.

In taking this strong stand, the Court first emphasized the pre-Johnson Act judicial equitable principles to maintain comity. "This Court," it stated, "has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where the state law affords an adequate remedy to the taxpayer. Matthews v. Rogers, 284 U.S. 521, 76 L.Ed. 447, 52 S.Ct. 217." 319 U.S. at 297.

The Court went on to state that "Congress recognized and gave sanction to this practice of federal equity courts by the" Johnson Act (note 6, *supra*). This early equity practice and, the Court continued, "the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes." 319 U.S. at 299.

The Court looked at the problem in practical terms. It recognized that the Johnson Act speaks only in terms of

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[8] **Standard Dredging Corp. v. Murphy**, 1943, 319 U.S. 306, 63 S.Ct. 1067, 87 L.Ed. 1416. The Court refers to this in **Great Lakes**, see 319 U.S. 293, at 296.

injunction and "that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights * * * without an injunction * * *." At the same time it was aware that the "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended." But the Court found it unnecessary to determine whether the Act itself should be construed "to prohibit a declaration by federal courts concerning the invalidity of a state tax." It was unnecessary, the Court stated, because "we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." 319 U.S. at 299. After examining the purpose of the Declaratory Judgment Act, 28 USCA §2201, and the discretion to withhold declaratory relief upon equitable principles, the Court then rephrased it this way. "The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the [Johnson Act] are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court." 319 U.S. at 300. But this general language about discretion is then translated into tangible specific terms: "With due regard for these considerations, it is the court's *duty* to withhold such relief when, as in the present case, it appears that" the taxpayer has "an adequate remedy" through a state court proceeding in which "he may assert his federal rights and secure a review of them by this Court". 319 U.S. at 300-01. (emphasis added)

Wide as a Court's power must be in the exercise of its

discretion whether to grant declaratory relief,[9] the Supreme Court makes clear that "it is the court's duty to withhold such relief" when, in the words of the Johnson Act, there is "a plain, speedy and efficient remedy * * * in the courts of" the state. 319 U.S. at 300-01. This is the decision that the Sixth Circuit has twice reached. *Helmsley v. City of Detroit, Mich.*, 6 Cir. 1963, 320 F.2d 476; *Wynadotte Chemicals Corp. v. City of Wynadotte*, 6 Cir., 1963, 321 F.2d 927. The critical turning point is the adequacy of the state court remedies. See *Township of Hillsborough Sommerset County, New Jersey v. Cromwell*, 1946, 326 U.S. 620, 66 S. Ct. 445, 90 L.Ed. 358; *Georgia Railroad & Banking Co. v. Redwine*, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; *Alger & Co. v. Peck*, S.D.Ohio, 1954, 119 F.Supp 812, affirmed, 1954, 347 U.S. 984, 74 S.Ct. 853, 98 L.Ed. 1120; *Levingston v. United States*, E.D.S.C., 179 F.Supp. 9, affirmed, 1960, 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed. 2d 1719. Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by that enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available.

The propriety of the District Court's consideration of this case turns, therefore, on whether state remedies in Texas are adequate. The answer is simple. Texas has a vast arsenal to assure orderly adjudication of the serious federal constitutional question here presented.

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[9] **Byers v. Byers**, 5 Cir.,1958, 254 F.2d 205; **American Fid. & Cas. Co. v. Pennsylvania Threshermen and Farmer's Mut. Cas. Ins. Co.**, 5 Cir., 1960, 280 F.2d 453; **Seniors v. Arnold**, 9 Cir., 1960, 284 F.2d 106. See also **Public Service Comm'n of Utah v. Wycoff Co.**, 1952, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291; Wright, Federal Courts §100 (1963).

At the outset, Texas has and enthusiastically employs a Declaratory Judgment Act of its own. Tex.Rev.Stat.Ann. art. 2524-1; *United Services Life Ins. Co. v. Delaney*, 5 Cir., en banc, 1964, 328 F.2d 483, at 489 (concurring). Almost in words which forecast this very suit, Texas recognizes that this procedure may be used to determine whether specified property is "exempt from ad valorem taxes assessed by the City of Houston and Houston Independent School District." *River Oaks Garden Club v. City of Houston*, 1963, . . . Tex . . ., 370 S.W. 2d 851, 852, Likewise, a Texas taxpayer has the right to injunctive relief from illegal tax assessments.[10] *Dallas County v. Dallas National Bank*, . . ., 142 Tex. 439, 179 S.W. 2d. 288; *City of Houston v. Baker*, Tex.Civ.App., 1915, 178 S.W. 820, writ refused; *City of Orange v. Levingston Shipbuilding Co.*, 5 Cir., 1958, 258 F.2d 240, 241. For all practical purposes, therefore, the Importer could have brought the very same suit which it asserted in the Federal Court in the District Courts of Harris County. The relief could have expressly requested a declaration, an injunction, or both.

In addition while there is no precise statutory machinery for a payment and a suit to recover back ad valorem taxes, the Courts of Texas recognize the existence of such a remedy. The Texas Courts hold that where a legislative act by its terms provides for penalty and interest on taxes (as is the case for ad valorem taxes), the taxpayer may pay the taxes and recover them back if the tax is illegal and in

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[10] To test legality of an occupation, gross receipt, franchise, license or other privilege tax or fee, Tex.Rev. Civ. Stat.Ann. art. 7057b, prescribes a statutory scheme for payment under protest and suit for recovery back thus eliminating the necessity for, and probably the availability of, an equitable injunctive remedy. **Cobb et. al. v. Harrington**, 1945, 140 Tex. 360, 190 S.W.2d 709.

many instances there is not even a requirement of a payment under formal protest. See, e.g., *Crow v. City of Corpus Christi*, 1948, 146 Tex. 558, 209 S.W.2d 922, 924; *National Biscuit Co. v. State*, 1940, 134 Tex. 293, 135 S.W.2d 687,692, 693. And finally, a Texas taxpayer can stand fast. Property is not subject to distraint by taxing authorities. To coerce payment, a court judgment is required. Despite the literal limitations in Art. 7329,[11] in the suit brought by the taxing authority, the taxpayer may urge the defense that the property is constitutionally exempt from taxation. *Whelan v. State*, 1955, 155 Tex. 14, 282 S.W.2d 378,[12] 54 Tex.Jur.2d Taxation §174. And, of course, when the taxpayer's contention is that specifically identified property is *exempt* from taxation, not the more

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[11] "There shall be no defense for a suit for collection of delinquent taxes, as provided for in this chapter except:

"1. That the defendant was not the owner of the land at the time the suit was filed.

"2. That the taxes sued for have been paid, or

"3. That the taxes sued for are in excess of the limit allowed by law, but this defense shall apply only to such excess."

[12] The Supreme Court of Texas stated: "Art. 7329 limits the defenses which may be interposed to suits for delinquent taxes. Subdivision 3 of that article reads as follows: 'That the taxes sued for are in excess of the limit allowed by the law, but this defense shall apply only to such excess.' The language of the subdivision 3 cannot be construed to mean that a taxpayer may defend against a suit for taxes only when his property is assessed at more than its fair market value or when the rate levied is in excess of that allowed by law. To so hold would require that the statute be held unconstitutional for it would operate to deny to the taxpayer his constitutional right to be taxed on an equal and unform basis with others. The legislature has no power to sanction discrimination between taxpayers by taking away defenses. * * *; **Howth v. French Independent School District**, Tex.Civ.App., 155 S.W.2d 1036, 1038, affirmed, 134 Tex. 211, 134 S.W.2d 1036." Without any extraordinary prescience, we forecasted in 1940 that the Texas Courts would so hold, **Norton v. Cass County**, 5 Cir., 1940, 115 F.2d 884, 886.

difficult claim that the property of others has been ignored or undervalued, it is easy for the taxpayer to meet the Texas burden "to show in dollars that he is worse off." *City of Orange, Texas v. Levingston Shipbuilding Co.*, 5 Cir., 1958, 258 F.2d 240, 246, 248, approved, *State v. Federal Land Bank of Houston*, 1959, 160 Tex. 282, 329 S.W. 2d 847, 850. But whatever shortcomings might be urged[13] as to the procedure of defending a suit for taxes, or payment and suit to recover back, this Court ever since *Norton v. Cass County*, 5 Cir., 1940, 115 F.2d 884, rejecting our earlier decision in *City of Fort Worth v. Southwestern Bell Telephone Co.*, 5 Cir., 1936, 80 F.2d 972, 974, because of the intervening Johnson Act has recognized that the remedy by injunction in the Courts of Texas is plain, speedy, efficient and complete.[14]

The record is plain. The remedies available in the State Courts of Texas are plain, speedy, efficient and altogether complete. Nothing the Federal Court can grant by way of

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[13] We find nothing helpful to the Importer's position in these cases so heavily stressed by it. **Republic Ins. Co. v. Highland Park Independent School Dist.**, Tex.Civ.App., 1938, 123 S.W.2d 784, writ denied, W.O.J., judgment correct; **Sharp v. Womack**, 1939, 132 Tex. 507, 125 S.W.2d 270; **Willis et al. v. State**, 1940, Tex.Civ. App., 142 S.W.2d 385 writ dism'd judgment correct; **State v. Hoffman**, 1918, 103 Tex. 133, 201 S.W. 653. To escape ultimate liability for interest or other statutory penalties, a tender of taxes, when that route is followed, must be for an amount not less than that found ultimately to be legally due.

[14] In **City of Fort Worth v. Southwestern Bell Telephone Company**, we expressed what we later described as perhaps "partly dictum when uttered" the view that "the practice in Texas apparently is to be liberal with injunctions before payment but opposed to recoveries afterwards." The significant change wrought by the Johnson Act was to make the test of adequacy depend, not on whether the legal remedy in the Federal Court was adequate, but whether under any State Court remedy, legal or equitable, legality could adequately be tested.

declaratory judgment or otherwise affords to this Importer a single right which it may not assert with confidence in the Courts of Texas.[15] What are we to do? The easy route, of course, on the very narrow substantive constitutional question here posed in the light of the uniquely limited body of law[16] is to examine into the merits as did the District Judge and then either affirm or reverse as the study requires. For such a procedure a beguiling argument is urged—the question being, after all, one solely of federal constitutionality, no court is better equipped than a Federal Court for that important decision. But important and sweeping as is the Import-Export Clause, we regard it as no more vital than, say, the Fifth Amendment and its requirement of due process, or the Fourteenth Amendment with its like requirement and that of equal protection. These were the usual frequent grounds asserted in invoking federal jurisdiction in the pre-Johnson Act days. Despite the judge-made equitable principles which restricted federal equitable relief and thus ameliorated the likelihood of state-federal clashes, Congress was of the view that these actions were both too disturbing to federal-state relations and worked an obvious discrimination as between small, local taxpayers and larger ones who could satisfy the dollar limitations

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[15] Within the very recent past in determining cases in which Federal Three-Judge District Courts have entered abstention orders, Texas Courts have held Texas statutes invalid under the Federal Constitution. See **Texas Liquor Control Board v. Ammex Warehouse Co.**, Tex.Civ.App., writ of error pending, 1964, 384 S.W.2d 768; **Miskell v. Termplan, Inc. of Houston**, Tex.Civ.App., 1964, 381 S.W.2d 129.

[16] Justice Frankfurter points out in his dissent in **Youngstown Sheet & Tube Co. v. Bowers**, 1959, 358 U.S. 534, 551, 79 S.Ct. 383, 3 L.Ed.2d 490, that this question has been before the Supreme Court less than a dozen times in the 132 years from **Brown v. Maryland**, 1824, 12 Wheat, 441, 25 U.S. 678, 6 L.Ed. 678, down to that date.

on the amount in controversy for suits grounded on the laws or Constitution of the United States[17] as well as diversity,[18] likewise often a favorable advantage of corporate taxpayers. *Livingston v. United States*, S.D.S.C. (3-Judge), 1959, 179 F.Supp. 9, 11, affirmed 1960, 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719;[19] *Norton v. Cass County*, 5 Cir., 940, 115 F.2d 884.

To this sort of discrimination generally, we would be discriminating particularly were we to ignore the plain requirement of the statute and the duty, articulated in the *Great Lakes* case "to withhold such relief" by declaratory judgment when the State remedy is adequate. That would give this Importer as a litigant an advantage not available to any other taxpayers in Harris County or Houston. More seriously, that would leave congressional policy to the desires of private litigants. The congressional policy is a restraint, not upon the parties, but upon the Court. Although, as must so often be the case in today's complex litigation, a Court must be dependent to a large extent upon the specific contentions, pro and con, of the parties and the indispensable help of earnest, vigorous advocates, see *W.R.B. Corp. v. Geer*, 5 Cir., 1963, 313 F.2d 750, 753, it was the Court after all which had the obligation of effectuating this congressional will. We are confident that had this vital issue been brought to his attention, the District Judge

[17] 28 USCA §1331(a).

[18] 28 USCA §1332(a).

[19] We said as much in Norton. "Congress has clearly expressed its intention to deprive the federal courts of jurisdiction of suits of this character where a plain, speedy and efficient remedy may be had at law or in equity in the courts of the state." 115 F.2d at 886.

would have declined to entertain the suit. Since what he would have done is what we hold he had to do, the declaratory judgment has to be vacated and the cause remanded for dismissal.[20]

JUDGMENT VACATED AND REMANDED

RIVES, Circuit Judge, dissenting:

With deference, I respectfully dissent.

The majority holds, in effect, that the *Great Lakes* case (319 U.S. 293) teaches that the Johnson Act, 28 U.S.C. §1341, establishes a *jurisdictional* rule preventing a federal court from entertaining a declaratory judgment action with respect to the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in courts of such state.[1]

I do not agree. The *Great Lakes* decision itself bases the affirmance "solely on the ground that, *in the appropriate*

[20] Once the District Court entertained the suit, as it did, the taxing authorities were, or at least reasonably felt themselves, obliged to file a compulsory counterclaim for the taxes as assessed. F.R. Civ.P. 13. Since the complaint should have been dismissed, there was no claim pending to which counterclaim was compelled. Under these peculiar circumstances it, likewise, falls. **Cf. Lawhorn v. Atlantic Refining Co.**, 5 Cir., 1962, 299 F.2d 353.

[1] Thus, in various parts of its opinion the majority states: ". . . were the Johnson Act not a restraint upon the Court itself but a mere matter left to the parties, we would readily conclude that there had been a waiver." (page 5). ". . . it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available." (page 9). "The congressional policy is a restraint, not upon the parties, but upon the Court." (page 14).

exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits." (319 U.S. at 301, 302.) (Emphasis supplied.) True, as the majority notes, the Court also said: ". . . it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back." (319 U.S. at 300, 301.) That statement, like all others must be considered against the background of facts and circumstances surrounding the case then being decided by the court. It was not meant to indicate that in any and all cases the existence of a plain, speedy and efficient state remedy is the only matter to be considered in the appropriate exercise of the court's discretion. In the *Great Lakes* case, the defendant made a motion to dismiss the action for the alleged reason that the complaint fails to state a claim upon which relief can be granted. That motion was followed by the defendants' answer, with full reservation of all rights under its motion to dismiss. See the opinion of the district court in *Great Lakes Dredge and Dock Co. v. Charlet,* E.D.La. 1942, 43 F.Supp. 981, 983. In the present case there was no motion to dismiss. The defendants not only formally admitted that the court had jurisdiction, but they demanded that the court exercise that jurisdiction, and stipulated in writing that the sole issue for determination was a ruling on the merits. They went even further and stipulated that the decision should apply not only to the tax year 1961 on which the complaint was based but to subsequent tax years. To that end the defendants stipulated the value of the claimed imports sought to be taxed for the years 1962 and 1963.

The complaint in the present case based jurisdiction both on the existence of a federal question, 28 U.S.C. §1331, and on the diversity of citizenship, 28 U.S.C. §1332. It alleged that "this action presents for determination a case of actual controversy within the jurisdiction of this court under 28 U.S.C.A. Section 2201." It alleged that the plaintiff was a citizen of New York and the defendants were citizens of the State of Texas. All of these allegations were expressly and formally admitted in the defendants' answer, which concluded as follows: "Wherefore, Defendants demand that the Court adjudicate the automobiles of Plaintiff to be taxable property within the State of Texas and within the jurisdiction of Defendants."

Thus while in the *Great Lakes* case *supra*, the adequacy of the state remedy was the only circumstance to be considered in the appropriate exercise of the court's discretion, there are in the present case other controlling circumstances to which I will revert. Before doing so, however, let me discuss further whether the Johnson Act does establish a jurisdictional bar to the entertainment of a declaratory judgment action with respect to the assessment, levy or collection of any tax under state law. That it does not is, I submit, manifest from the plain language of the one-sentence statute. "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. No amount of legalistic language can convert that plain statute into a denial of federal jurisdiction to entertain a declaratory judgment action with respect to a tax under state law. The Supreme Court itself has repeatedly recognized that the *Great Lakes* case

went no further than to establish a rule of discretion.[2]

Professor Moore, after quoting at length from the *Great Lakes* case, stated with his usual clarity the effect of that decision:

> "Thus the Court did not give a definitive answer as to whether or not the 1937 [Johnson] Act includes declaratory judgments. In view of the fact that the Declaratory Judgment Act had been on the books for three years prior to the 1937 Act, Congress was undoubtedly aware of the remedies afforded by that procedure. That the 1937 Act made no mention of declaratory judgments is evidence that the declaratory remedy was not included within the Act's prohibition. Thus federal courts still have technical jurisdiction to render declaratory judgments as to the invalidity of state taxes. But it is well settled that courts, pursuant to judicial discretion, may refuse to exercise jurisdiction in declaratory actions.[9] The considerations which prompted courts of equity to refuse to enjoin the collection of state taxes are equally applicable to actions for *declaration* of invalidity of such taxes.[10] The exercise of discretion, rather than lack of jurisdiction over the subject matter, is here at issue."
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> "[9] ¶57.08, *supra*.
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> "[10] Great Lakes & Dock Co. v. Huffman, n. 7, *supra* [(1943) 319 U.S. 293, 63 S.Ct. 1070, 87 L.ed. 1407]."

6 Moore, Federal Practice ¶57.18 (2d ed. 1952), pp. 3096-97.

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[2] **Spector Motor Co. v. McLaughlin**, 1944, 323 U.S. 101, 105-06; **Hillsborough v. Cromwell**, 1946, 326 U.S. 620, 623; **Spector Motor Service v. O'Connor**, 1951, 340 U.S. 602, 604; **England v. Medical Examiners**, 1964, 375 U.S. 411, 423-24.

The question involved in the present case is not one of jurisdiction but one of the appropriate exercise of the court's discretion. Clearly and admittedly the court had jurisdiction both under the federal question statute, 28 U.S.C. § 1331, and under the diversity of citizenship statute, 28 U.S.C. § 1332. The declaratory judgment statute itself makes clear that the court has jurisdiction with respect to state taxes. That statute begins: "In a case of actual controversy within its jurisdiction, *except with respect to federal taxes,* any court of the United States" etc. (Emphasis supplied.) There could hardly be a plainer case calling for the application of the rule *ex pressio unius est exclusio alterius.* While the statute expressly excludes controversies over federal taxes, controversies over state taxes are not similarly excluded. See 3 Barron & Holtzoff, Federal Practice & Procedure, Rules ed. (Wright) § 1264, p. 290, with the pertinent authorities collected in footnote 45. That the Johnson Act does not establish a judicial bar to a district court's entertainment of a declaratory judgment action with respect to a tax under state law is made clear by simply reversing the positions of the parties. If the present defendants, the City of Houston and the Houston Independent School District, had as plaintiffs filed this complaint naming the present plaintiff as defendant, there could be no argument but that the court had jurisdiction under sections 1331, 1332 and 2201 of Title 28, United States Code. In substance and effect, that is what the defendants did do when they stipulated on pretrial "that the sole issue for determination" is a decision on the merits, that that decision should extend beyond the tax year 1961 involved in the complaint, and should be binding for subsequent tax years; and when in their answer they made formal demand that the court adjudicate the merits. Clearly, I submit, the

district court had jurisdiction and the only question is whether in the appropriate exercise of its discretion, the court should have declined to consider the merits.

As has been stated, there was no motion to dismiss in this case. Admittedly there are cases in which the district court should refuse sua sponte to exercise its jurisdiction. *Matthews v. Rodgers*, 1932, 284 U.S. 521, arose before the original Johnson Act was passed in 1934 (48 Stat. 775). In that case the plaintiff sought to enjoin the collection of a state tax as an unconstitutional burden on interstate commerce. The Supreme Court noted that the objection to the equity jurisdiction of the district court had been properly raised by motion to dismiss, but also stated:

> "The want of equity jurisdiction, if obvious, may and should be objected to by the court of its own motion. *Twist v. Prairie Oil Co.*, 274 U.S. 684, 690. In other cases, this jurisdictional requirement, unlike the others mentioned, may be treated as waived if the objection is not presented by the defendant *in limine*. *Duignan v. United States*, 274 U.S. 195, 199; *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481, 484; *Thompson v. Railroad Companies*, 6 Wall. 134; compare *Matson Navigation Co. v. United States, ante* [284 U.S.] p. 352; Hilton v. Dickinson, 108 U.S. 165, 168; *Grace v. American Central Ins. Co.*, 109 U.S. 278, 283-284; *Bors v. Preston*, 111 U.S. 252, 255." (284 U.S. 524-25)

The two Sixth Circuit cases relied on in the majority opinion do not support a holding that under the circumstances of the present case the district judge should have sua sponte dismissed the complaint. In *Wyandotte Chemicals Corp. v. City of Wyandotte*, 6 Cir. 1963, 321 F.2d

927, 929, the defendants moved to dismiss the complaint and the district judge denied the motion on the ground that the state remedies were not adequate. The question presented was the adequacy of the state remedies. In *Helmsley v. City of Detroit, Michigan*, 6 Cir. 1963, 320 F.2d 476, the district judge was not misled into exercising jurisdiction but acted sua sponte and dismissed the complaint and his judgment was affirmed. That is different from the present case where not only was the discretion of the district court not invoked but the defendants actively invited and even demanded that the district court decide the merits.

If, however, there should be any doubt as to the jurisdiction of the district court to entertain the declaratory judgment action, I submit that there can be no doubt whatsoever as to its jurisdiction to entertain the defendants' counterclaim seeking to recover the taxes for the year 1961. The majority disposes of that question in the last footnote of the opinion, stating: "Once the District Court entertained the suit, as it did, the taxing authorities were, or at least reasonably felt themselves, obliged to file a compulsory counterclaim for the taxes as assessed. F.R.Civ.P. 13." What the majority overlooks is that at the time the counterclaim was filed the district court had not decided to entertain the suit. The counterclaim was filed along with the answer as the defendants' only pleading in the case. Certainly the defendants could reasonably have felt themselves under no compulsion to file that counterclaim. Not only could they have had no doubt but that the district court would have allowed the counterclaim to be filed by way of amendment under Rule 15, Fed.R.Civ.P., but they had an actual right under Rule 12 to withhold the filing of the counterclaim until

the district court had ruled on the appropriate motion to dismiss. See *Lawhorn v. Atlantic Refining Co.*, 5 Cir. 1962, 299 F.2d 353, 356-57; 2 Moore, Federal Practice ¶12.07, p. 2244.

At a time when they were under no compulsion to do so, the defendants counterclaimed seeking to recover the taxes for the year 1961. The district court had jurisdiction of that counterclaim just as it would have had jurisdiction over an original action filed by the defendants, the City and the School District, both under the grant of jurisdiction of federal questions, 28 U.S.C. § 1331, and under the diversity statute, 28 U.S.C. § 1332. In a suit by the State Tax Collector of Mississippi for the collection of past due taxes invoking diversity jurisdiction, this Court held that the State of Mississippi was the real party-plaintiff and that, a state not being a citizen, there was no jurisdiction under the diversity statute. *Craig v. Southern Natural Gas Co.*, 5 Cir. 1942, 125 F.2d 66. There is, of course, no dispute in this case and it is formally admitted that the defendants, the City and the School District, are in the position of citizens within the diversity statute. Ordinarily, actions brought by or against a political subdivision of a state are maintainable in a federal court on the ground of diversity of citizenship. See cases collected in Annotation 147 ALR, p. 790, et seq. In addition, this case arises under the Constitution of the United States within section 1331 of Title 28, United States Code. Under that statute there would be jurisdiction of a case filed by the state itself, and there can be no possible doubt that the City and School District could validly invoke federal jurisdiction for the collection of the taxes.

The situation faced by the court in this case is almost analogous to that with which we were confronted in *City of Orange, Texas v. Levingston Shipbuilding Co.*, 5 Cir. 1958, 258 F.2d 240. There we held that the Court was without jurisdiction of a complaint which prayed for an injunction prohibiting the City from enforcing its tax assessment; that that was in the very teeth of the plain command of the statute, 28 U.S.C. § 1341. However, the City had filed an original suit for the recovery of its taxes which had been removed to the federal court, and this Court held that, "with the injunction out of the way, the suit was simply one for delinquent taxes for 1954 and 1955," 258 F.2d at 241, and proceeded to decide the merits.

In summary, I would hold that the *Great Lakes* case does not teach that the Johnson Act establishes a jurisdictional rule against a federal court entertaining a declaratory judgment action with respect to taxes under state law; that the question to be decided is whether the district court committed an error of discretion in entertaining the declaratory judgment action; that no such error was committed; that the district court had no discretion but was under a duty to entertain the defendants' counterclaim and to decide the merits under that counterclaim.

The majority does not reach a decision of the merits, and I will therefore forego any discussion other than to say that I agree with the opinion and decision of the district court. *Standard-Triumph Motor Co. v. City of Houston*, S.D. Tex. 1963, 220 F.Supp. 732. I think that the judgment should be affirmed and, therefore, respectfully dissent.

APPELLEE'S PETITION FOR REHEARING

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

(Caption Omitted)

To The Honorable Judges Of The United States Court Of Appeals For the Fifth Circuit:

Standard-Triumph Motor Company, Inc., the Plaintiff-Appellee above named, presents this, its petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows as follows:

I.

The Court, in its opinion of reversal herein, has clearly failed to apply the rule that a compulsory counterclaim filed under Rule 13(a) shall be retained by the Court even though the main controversy is dismissed for lack of federal jurisdiction, to decide the counterclaim, if there exist independent grounds of jurisdiction to support the counterclaim.

II.

The Court, after reaching the decision on lack of jurisdiction of the main controversy, should have reviewed the take-nothing judgment entered against the Defendant-Appellant on its compulsory counterclaim on the merits, to determine jurisdiction and the validity of the defense of illegal tax.

III.

The decision in the case at bar wherein this Court has vacated the judgment rendered against the City on its counterclaim by the trial court, is in conflict with holdings on this point in the Fifth Circuit case of *Haberman v. Equitable Life Assurance Society of the U.S.*, 1955, 224 F.2d 401; with *Moore v. New York Cotton Exchange* (1926), 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750; with *Great Lakes Rubber Corporation v. Cooper Company*, 3 Cir. 286 F.2d 631 (1961); with *Sachs v. Sachs*, 3 Cir. 1959, 265 F.2d 31; and *Pioche Mines Consol., Inc. v. Fidelity Philadephia Trust Company*, 9 Cir. 1953, 206 F.2d 336.

IV.

The Court's interpretation of the action of the Defendants-Appellants being "obliged to file a compulsory counterclaim for the taxes assessed" was in error for the reason that the compulsory counterclaim filed by them was filed contemporaneously with its answer without filing a motion to the jurisdiction under the provisions of Rule 12(b)(1).

V.

The case of *Lawhorn v. Atlantic Refining Company*, 5 Cir. 1962, 299 F.2d 353 does not have the effect of holding that the original complaint should have been dismissed when there was no claim pending to which the counterclaim was compelled, for in *Lawhorn*, the Defendant filed a motion to dismiss under the provisions of Rule 12(b)(6) prior to and without filing a pleading for a counterclaim. In the case at bar, the Defendant-Appellant filed no motion but did file a pleading in answer and in counterclaim praying for the recovery of $17,781.03 in taxes and submitted its counterclaim on the merits to the trial court.

VI.

The case of *City of Orange, Texas v. Levingston Shipbuilding Company*, 5 Cir. 1958, 258 F.2d 240, is in conflict with the decision of the majority as there the Court entered judgment on the merits of the original suit for taxes after finding lack of jurisdiction of the counterclaim for injunction.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed on the merits.

BURKE HOLMAN
Attorney for Petitioner and Plaintiff-Appellee
7th Floor, Tennessee Bldg.
Houston, Texas 77002

CERTIFICATE OF COUNSEL

I, BURKE HOLMAN, attorney for Standard-Triumph Motor Company, Inc., Petitioner, do hereby certify that the foregoing Petition for a rehearing of this cause is presented in good faith and not for purpose of delay. Further, I certify that a copy of this Petition has been forwarded by United States Certified Mail, Return Receipt Requested, to the Honorable Homer T. Bouldin, First Assistant City Attorney, City of Houston, City Hall, Houston, Texas 77002, Attorney of Record for the Defendant-Appellant.

BURKE HOLMAN

PER CURIAM OPINION OVERRULING PETITION FOR REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Caption Omitted)

(July 6, 1965.)

ON PETITION FOR REHEARING

Before RIVES and BROWN, Circuit Judges, and NOEL, District Judge.

PER CURIAM: Considering that the restraint of the Johnson Act is on the Court and not the parties, so that the so-called counter-claim was merely incidental to a claim for declaratory relief which ought not to have been entertained and the relief thus sought by the City would have flowed automatically from the proper framing of the judgment, F.R.Civ.P. 54(c), the cases[1] now urged by the Importer to sustain the take nothing judgment entered in its favor on the City's counterclaim do not compel an affirmance.

DENIED.

JUDGE RIVES DISSENTS.

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[1] **Haberman v. Equitable Life Assur. Soc.**, 5 Cir., 1955, 224 F.2d 401; **Great Lakes Rubber Corp. v. Cooper Co.**, 3 Cir., 1961, 286 F.2d 631.

JUDGMENT

(Caption Omitted)

Appeal from the United States District Court for the Southern District of Texas

Before RIVES and BROWN, Circuit Judges, and NOEL, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by Counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court for dismissal in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Standard-Triumph Motor Company, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Rives, Circuit Judge, dissents.

Issued as Mandate:	July 21, 1965
Recoverable Costs:	
Docketing cause, etc.	$ 25.00
Cost of printing record	144.00
	$169.00

May 25, 1965